IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

WP(C).No. 28615 of 2003(F)

PETITIONERS:
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1. **K.M.GEORGE, S/O. LATE K.J.MATHEW,**
   AGED 50 YEARS, JUNIOR SUPERINTENDENT,
   DISTRICT MEDICAL OFFICE, KOTTAYAM, RESIDING AT
   KADALIKKATTTU HOUSE, THALAYOLAPARAMBU P.O.,
   KOTTAYAM.

2. **M.BALAKRISHNAN, S/O. LATE K.K.MADHAVAN,**
   AGED 51 YEARS, HEAD CLERK, PRIMARY HEALTH CENTRE,
   ATHIRAMPUZHA P.O., KOTTAYAM DISTRICT, RESIDING AT
   `MADHVASADANAM', KUMARAKOM P.O., KOTTAYAM DIST.

3. **N.SURENDRAN,**
   S/O.LATE M.P.NEELAKANDA PILLAI, AGED 51 YEARS,
   JUNIOR SUPERINTENDENT, DISTRICT MEDICAL OFFICE,
   KOTTAYAM, RESIDING AT `AMPARA', MELAMPARA P.O.,
   PALAI, KOTTAYAM DISTRICT.

4. **K.H.SUSILA, D/O. MR.HEZEKIEL JOSEPH,**
   AGED 49 YEARS, HEAD CLERK, TALUK HEAD QUARTERS
   HOSPITAL, THODUPUZHA, IDUKKI DISTRICT,
   RESIDING AT `VETTIKKATTUMALAYIL' HOUSE, MUTTOM,
   THODUPUZHA.

BY ADV. SRI.O.V.RADHAKRISHNAN (SR.)
SRI.ANTONY MUKKATH

RESPONDENTS:
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1. **STATE OF KERALA,**
   REPRESENTED BY ITS SECRETARY TO GOVERNMENT,
   DEPARTMENT OF HEALTH AND FAMILY WELFARE,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

WPC. NO.28615/2003

2. DIRECTOR OF HEALTH SERVICES,
THIRUVANANTHAPURAM.

3. DISTRICT MEDICAL OFFICER OF HEALTH,
KOTTAYAM.

4. DISTRICT MEDICAL OFFICER OF HEALTH,
IDUKKI AT PAINAVU.

5. C.K.SURESH,
JUNIOR SUPERINTENDENT, OFFICE OF THE DISTRICT MEDICAL OFFICER, MANANTHODY, WAYANAD DISTRICT.

6. K.RAGHUNATHAKUMAR,
LAY SECRETARY & TREASURER, COMMUNITY HEALTH CENTRE ADOOR.

7. S.SADANANDAN,
JUNIOR SUPERINTENDENT, MATERNAL AND CHILD HEALTH HOSPITAL, THIRUVANANTHAPURAM.

8. ZENO P.JOSEPH,
LAY SECRETARY AND TREASURER,GOVERNMENT HOSPITAL, MAVELIKKARA, ALAPPUZHA DISTRICT.

BY ADV. SRI.N.SUGATHAN
SRI.M.V.THAMBAN
GOVERNMENT PLEADER SMT.T.B.RAMANI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 14/11/2007, ALONG WITH WPC NO.7686/2004 AND CONNECTED CASES THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.28615/2003

APPENDIX

EXT.P1:- COPY OF THE ORDER NO.ED1-116532/83/DHS DT. 1.10.84 OF THE 2ND RESPONDENT.

EXT.P2:- COPY OF THE ORDER NO.ED1.98346/83/DHS DT. 4.12.83 OF THE 2ND RESPONDENT.

EXT.P3:- COPY OF THE SENIORITY LIST OF THE LD CLERKS PUBLISHED AS PER ORDER NO.EG1-132140/81/DHS DT. 17.12.81 OF THE 2ND RESPONDENT.

EXT.P4:- COPY OF THE FINAL SENIORITY LIST OF UD CLERKS AS PER ORDER NO.0 & M3-31786/88/DHS DT. 17.1.85 OF THE 2ND RESPONDENT.

EXT.P5:- COPY OF THE PROCEEDINGS NO.ED2-12915/03 /DBS DT. 21.3.03 OF THE 2ND RESPONDENT.

EXT.P6:- COPY OF THE PROCEEDINGS NO.(K.DIS) ED2-480432/2000/DHS DT. 24.5.2000 OF THE 2ND RESPONDENT.

EXT.P7:- COPY OF THE PROCEEDINGS NO.K.DIS ED2/59148/01/DHS DT. 13.7.01 OF THE 2ND RESPONDENT.

EXT.P8:- COPY OF THE ORDER NO.ED1/1/2001/(2)/DHS DT. 25.1.01 OF THE 2ND RESPONDENT.

EXT.P9:- COPY OF THE ORDER NO.ED1/1/01/DHS DT. 19.9.01 OF THE 2ND RESPONDENT.

EXT.P10:- COPY OF THE PROVISIONAL SENIORITY LIST OF JUNIOR SUPERINTENDENTS AS PER ORDER NO.ES2-20794/01/DHS DT. 23.6.01 OF THE 2ND RESPONDENT.

EXT.P11:- COPY OF THE ORDER NO.ED2-12914/03/DHS DT. 24.3.03 OF THE 2ND RESPONDENT.

EXT.P12:- COPY OF THE ORDER ES2-43917/2000/DHS DT. 8.12.2000 OF THE 2ND RESPONDENT ALONG WITH EXTRACT REVISED SENIORITY LIST OF UD CLERKS.

EXT.P13:- COPY OF THE GO(MS) NO.333/02/H&FWD DT. 31.12.02 OF THE IST RESPONDENT ALONG WITH SECOND REVISED LIST OF UD CLERK AS ON 1.4.88.

EXT.P14:- COPY OF THE OBJECTION PETITION DT. 9.1.03 OF THE 2ND PETITIONER.

EXT.P15:- COPY OF THE GO(MS)NO.78/03/H&FWD DT. 26.4.03 OF THE IST RESPONDENT ALONG WITH FINAL SENIORITY LIST OF UD CLERKS PUBLISHED AS APPENDIX TO THE SAID GO.

W.P.(C0 NO.28615/2003

EXT.P16:- COPY OF THE JUDGMENT DT. 12.10.01 IN OP. NO.4383/01 OF THIS HONOURABLE COURT.

EXT.P17:- COPY OF THE JUDGMENT IN OP. NO.14193/02 DT. 31.5.02 OF THIS HONOURABLE COURT.

EXT.P18:- COPY OF THE JUDGMENT IN OP. NO.7205/92 DT. 12.6.02 OF THIS HONOURABLE COURT.

EXT.P19:- COPY OF THE ORDER NO.ED1-1/03/DHS DT. 28.4.03 OF THE 2ND RESPONDENT.

EXT.P20:- COPY OF THE ORDER NO.ED3-9-03 DHS DT. 28.4.03 OF THE 2ND RESPONDENT.

EXT.21:- COPY OF THE ORDER NO.ED3/09/03/DIS. DAT DT. 5.6.03 OF THE 2ND RESPONDENT.

EXT.P22:- COPY OF THE JUDGMENT IN WA. NO.2078/97 FY. 14.8.02 OF THIS HONOURABLE COURT.

EXT.P23:- COPY OF THE NOTICE NO.ED1-1/04/DHS DT. 10.2.04 OF THE 2ND RESPONDENT.

EXT.P24:- COPY OF THE ORDER DT. 11.12.03 IN IA. NO.15093/03 IN OP. 1530-7/03 OF THIS HONOURABLE COURT.

EXT.P25:- COPY OF THE ORDER NO.G2-19547/93/TX DT. 4.7.95 OF THE BOARD OF REVENUE (TAXES) THIRUVANANTHAPURAM.

EXT.P26:- COPY OF THE TO(P) NO.36/91/0&ARD DT. 2.12.91 OF THE IST RESPONDENT.

EXT.P27:- COPY OF THE ORDER NO.ED1-157457/75/DHS DT. 22.4.76 OF THE DIRECTOR OF HEALTH SERVICES, THIRUVANANTHAPURAM.

EXT.P28:- COPY OF THE ORDER NO.ED1-87034/83/DHS DT. 30.8.83 OF THE DIRECTOR OF HEALTH SERVICES, TRIVANDRUM.

EXT.P29:- COPY OF THE ORDER NO.ED1-41398/86/DHS DT. 3.4.86 OF THE DIRECTOR OF HEALTH SERVICES, TRIVANDRUM.

EXT.P30:- COPY OF THE GO(MS) NO.81/86/H&FLD DT. 26.4.86 OF THE IST RESPONDENT

/TRUE COPY/

P.S. TO JUDGE

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A.K. Basheer, J.

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said list was challenged by some employees before this Court in several writ petitions.

It is on record that on December 8, 2000 a revised seniority list was published, a copy of which is on record as Ext.P12. Soon thereafter on December 31, 2002 yet another revised seniority list was published by the Government. A copy of the said list has been produced as Ext.P13. It is also not in dispute that Ext.P13 list was also subjected to challenge in various writ petitions. Pursuant to the direction issued by this court in those writ petitions, the Government published Ext.P15 final seniority list on April 26, 2003, a copy of which has been produced as Ext.P15, and the propriety, legality and correctness of which is the central issue involved in all these writ petitions.

I hasten to add that the case of the petitioners in W.P.(C) No.40719/03 and OP.15307/03 stands slightly on a different footing, while that of the others is more or less identical. I will refer to the respective contentions in these writ petitions in detail at a later stage.

Sri.O.V.Radhakrishnan, learned senior counsel appearing for the petitioners in W.P.28615/03 contends that Ext.P15 seniority list is ex-facie vitiated and arbitrary. Petitioners who were initially appointed as Lower Division Clerks between May 1976 and July 1978 had become eligible for promotion as Upper Division Clerks after passing the requisite departmental test. Accordingly, they were promoted as Upper Division Clerks and later as Head Clerks between April 1998 and February 2000.

Petitioners 1 and 3 were promoted as Junior Superintendents in 2001. Learned senior counsel points out that in Ext.P3 seniority list of Lower Division Clerks, all petitioners except petitioner No.2 were placed above respondents 5 to 8 in seniority. Similarly, in Exts.P4, P12 and P13 also, the seniority of the petitioners were recognised.

However, Ext.P15 final list was published in 2003. It was noticed that the seniority of the petitioners was totally upset and they were placed below respondents 5 to 8. It is contended by the learned senior counsel that these arbitrary exercise was carried out by the Government without affording an opportunity to the petitioners to be heard. Resultantly, respondents 5 to 8 who were hitherto treated as juniors to the petitioners have taken a march over the petitioners. They have been given promotion on the basis of the seniority accorded to them in Ext.P15 list. Exts.P19 to 21 are stated to be orders of promotion issued in favour of respondents 5 to 8. Those orders are also impugned by the petitioners in W.P.(C)No.28615/03.

Per contra, it is contended by Sri.Sugathan, learned counsel for respondents 5 to 8 that petitioners had obtained inter-district transfer on their request and thus they have become juniormost in their respective districts to which they were transferred. It appears that initially this aspect was not taken into account while preparing the provisional seniority list. Later, the said mistake was rectified and final seniority list was published after reckoning the correct seniority position. It is further contended by

the learned counsel that the delay, if any, in finalisation of the seniority list was not due to any laches on the part of respondents 5 to 8 or other similarly placed employees. There were various long pending litigations which culminated in the judgment of this Court, in which the Government was directed to finalise the seniority list after hearing all concerned. Learned counsel has also invited my attention to Ext.R7(a) order of the Government in response to the contention raised on behalf of the petitioners to the effect that the recruitment was made taking the State as a single unit and that they were not recruited on a districtwise basis. It is the contention of the petitioners that inspite of Ext.R7 (a) order of the Government, district wise recruitment was implemented only in the year 1986 . In support of the above contention learned senior counsel has placed reliance on Ext.P13 proceedings of the Health and Family Welfare Department. It is also pointed by the learned senior counsel that Ext.P3 will show that unit of recruitment was indicated as throughout the State of Kerala and not any particular district.

It is pertinent to note that the official respondent have not filed the counter affidavit in this writ petition. However the counter affidavit field by the official respondent in OP.15307/2003 has been adopted in this case also. As rightly pointed out by the learned senior counsel, the specific contention raised by the petitioners that they were not heard before publishing Ext.P15 seniority list has not been controverted by the respondent at all. Learned counsel for respondents 5 to 8 also

fairly concedes that petitioners were not heard before finalising Ext.P15 seniority list. The fact that petitioners were given promotion as Upper Division Clerks/Head Clerks/Junior Superintendents etc. from time to time is not in dispute at all, after declaration of their probation in various categories at appropriate stages. It is also pertinent to note that petitioners had no occasion to raise objection to Ext.P13 revised seniority list since their seniority was not disturbed in the said list. Therefore I find considerable force in the contention raised by the learned senior counsel that the Government was not justified in denying an opportunity of being heard to the petitioners before upsetting their seniority in Ext.P15 list. In that view of the matter I do not propose to deal with the question as to whether the initial recruitment of the petitioners was on a district wise basis or State wise basis and also whether the petitioners had lost their seniority because of their inter-district transfer. But as pointed out by learned Government Pleader and Sri.Sugathan, on the face of Ext.R7(a) Government order of the year 1971, petitioners cannot be heard to say that they would not have lost seniority on seeking inter-district transfer. In this context learned Government Pleader also invites my attention to G.O.No.4/PD dated 2/1/1961. In my view , these are all matters which have to be considered by the competent authority with reference to the relevant materials.

Before I part with these cases, it may be only appropriate to refer to a decision of their Lordships of the Supreme Court in

Sudhakaran v. State of Kerala (2006 (3) KLT 817, in which it has been laid down that the proviso to Rule 27A applies to all employees transferred on request. It has been further held that no distinction can be made between employees whose promotion post is a State-wise post and those where the promotion posts are district-wise posts. Sri.Sugathan submits that the above decision is squarely applicable in WP. 28615/03. However Sri.O.V.Radhakrishnan, learned senior counsel submits that the dictum laid down by the Supreme Court can be easily distinguished in this writ petition. Yet again, I refrain from making any further observation on this aspect of the issue since in my view this question can also be considered by the Government while taking a final decision in the matter.

In the above facts and circumstances I am satisfied that petitioners in WP.28615/2003 are entitled to get an opportunity of being heard. To that extent petitioners would be entitled to get some relief in this writ petition.

OP.15307/2003 & WP.40719/2003 & 7686/2004:

Petitioners in these 3 cases also primarily have impugned the final seniority list referred to above in the earlier part of this judgment. But in these cases petitioners' seniority has been upset since according to the official respondents, it was noticed that they were given promotion as Upper Division Clerks on a wrong application of Rule 28(bb) and (bbb) of Part II of the KS & SSR.

It is further pointed out by Sri.Sugathan, learned counsel for respondent No.3 in WP.40719/2003, that the revised final seniority list is perfectly valid since the Government had rightly rectified the anomalies in the same. It is further contended that the promotion given to the petitioners from September 16, 1985 was found to be irregular and it was the said mistake which was sought to be rectified in the final seniority list. Yet again, I refrain from making any further observation on this aspect of the issue in view of the fact that petitioners have raised a specific contention that they were not heard before the final list was published. However it is brought to my notice that petitioner No.2 in WP.40719/2003 was in fact heard as could be seen from Ext.R3 (e). But it is submitted by Sri.M.V.Bose learned counsel for the petitioners that the relevant aspects of the issue in the correct perspective were not adverted to by the respondents while rejecting the contentions raised by the petitioners.

There is yet another aspect of the matter. Petitioner in WP.7686/2004 has invited my attention to Ext.P9 order of the Government dated November 13, 2003. By the said order the Government has effected partial modification of its earlier order and certain corrections have been incorporated in the final seniority list. As rightly pointed out by Sri.Abdul Samad, learned counsel for the petitioner in this writ petition, these modifications/alterations in the rank position in the seniority list has been a never ending process eversince 1995. The Government has been passing orders effecting alteration in the

ranked list without affording any opportunity to the incumbents . It is pointed out by the learned counsel that some of the orders were passed either by the Director or Government at the instance of some of the parties who had approached this Court. Resultantly this anomalous situation has arisen whereby the union of the incumbents like the petitioners have made to run from pillar to post. But learned Government Pleader points out that Ext.P9 was issued by the Government in an appeal preferred by a candidate under Rule 27B. Be that as it may. The fact remains that the Government or the Directorate has not yet been able to give a quietus to the issue even though such a specific direction was issued by this Court in a batch of writ petitions which culminated in Ext.P15 final seniority list. Having regard to the entire facts and circumstances these writ petitioners are also entitled to be heard.

O.Ps.14932, 14958, 16572/2003 & WP.40301:

Petitioners in these writ petitions have also got a common grievance that their seniority was upset without affording them an opportunity to be heard. As noticed already, the official respondents have not filed counter affidavits in this case controverting the specific contentions raised by the petitioners. On the contrary, the counter affidavit filed by the respondents in O.P.No.450/2003 has been adopted in these cases. Curiously the said petition was dismissed as infructuous by me yesterday. Anyhow, the fact remains that the seniority of the petitioners has been upset by introduction of the revised seniority list dated

April 26, 2003 which has been marked as Ext.P15 in WP.28615/2003. Since I have already issued a direction to the Government in the other writ petitions, to hear the petitioners in those cases, I am satisfied that the petitioners in these cases can also be given the same benefit. It will be open to the petitioners in all these cases to raise their respective contentions before the Government.

In view of the above facts and circumstances the writ petitions are disposed of with a direction to the Government to take an appropriate decision in the matter and prepare a final seniority list of Upper Division Clerks in the Department of Health strictly in accordance with law. Needles to mention that petitioners and all others who are likely to be affected by any order that may be passed shall be afforded sufficient opportunity to be heard before any decision is taken int he matter, at least to ensure that a further round of litigation on this score is avoided. Needless to mention that on finalisation of the seniority list, final decision in the matter shall be taken by the Government as directed above within a period of six months from the date of receipt of a copy of this judgment.

A.K. Basheer
Judge.

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